

ORIGINAL

NO. 86-327

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

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MULLINS COAL COMPANY, INCORPORATED OF
VIRGINIA, OLD REPUBLIC INSURANCE COMPANY
and JEWELL RIDGE COAL CORPORATION,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF
LABOR, GLENN CORNETT, LUKE R. RAY, GERALD
R. STAPLETON AND WESTMORELAND COAL
COMPANY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANTING
PETITIONER'S PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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The respondents, Luke R. Ray and Gerald R. Stapleton oppose granting a writ of certiorari and state that there is not a clear conflict between the Circuits and any alleged conflicts with the Administrative Procedure Act were not before the Fourth Circuit Court of Appeals and, therefore, not an appropriate issue for a Writ of Certiorari.

I. THERE IS NO CLEAR CONFLICT IN THE CIRCUITS.

The petitioners claim there is a conflict in the Circuits between Back v. Director, 796 F.2d 169, (6th Cir. 1986) and Stapleton, et al. v. Westmoreland Coal Co., et al., 785 F.2d 424 (1986) (en banc). In Back, supra, a three judge panel of the Sixth Circuit rejected the holding of Stapleton, supra., in a cursory four page opinion.

The respondents would maintain that the Fourth and Sixth Circuits are not in conflict until the Sixth Circuit gives this matter the indepth hearing and consideration given by the Fourth Circuit.

II. QUESTIONS OF VIOLATIONS OF ADMINISTRATIVE PROCEDURE ACT.

The Fourth Circuit Court of Appeals entered an order directing that Gerald Stapleton v. Westmoreland Coal Company and Director, Office of Workers' Compensation Programs, U. S. Department of Labor, Benefits Review Board and Luke R. Ray v. Jewell Ridge Coal Company and Director, Office of Workers' Compensation Programs, United States Department of

Labor and Mullins Coal Company, Inc., Inc. of Virginia, and Old Republic Industries v. Glenn Cornett and Director, Office of Workers' Compensation Programs, United States Department of Labor be consolidated for the purposes of en banc hearing by the court. By that order, the court directed the parties to address the following issues:

(1) Whether, despite the evidence of negative or non-qualifying x-rays, ventilatory studies, blood gas studies, and/or physicians' opinions, the interim presumption of pneumoconiosis under 20 C.F.R. Section 727.203(a) is automatically triggered by any one of the following:

- (a) one positive x-ray;
- (b) one set of positive ventilatory studies;
- (c) one set of positive blood gas studies;
- (d) one physician's opinion.

(2) Once the interim presumption of pneumoconiosis is triggered, whether and to what extent is non-qualifying medical evidence permitted to rebut the presumption under 20 C.F.R. Section 727.203(b).

The question as to whether Stapleton, supra, violates the Administrative Procedure Act was not briefed before the Fourth Circuit nor argued and, therefore, is not appropriate as a source of appeal.

Therefore, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LUKE R. RAY
GERALD R. STAPLETON

By Counsel

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